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LINDA MILLER SAVITT, SBN 094164
CHRISTINE T. HOEFFNER, SBN 100874
ADRIAN GUIDOTTI, SBN 92680
BALLARD ROSENBERG GOLPER & SAVITT, LLP
500 North Brand Boulevard, 20th Floor
Glendale, CA 91203-9946
Telephone: 818-508-3700; Facsimile: 818-506-4827

LAWRENCE A. MICHAELS, SBN: 107260
MITCHELL SILBERBERG & KNUPP
11377 W. Olympic Blvd.
Los Angeles, CA 90064
Telephone: (310) 312-2000; Facsimile: (310) 312-3100

CAROL A. HUMISTON, SBN 115592
Senior Assistant City Attorney, City of Burbank
275 E. Olive Avenue
Burbank, CA 91510
Telephone: (818) 238-5707; Facsmile: (818) 238-5724
Attorneys for Defendant
CITY OF BURBANK, including the Police Department of the City of Burbank

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

OMAR RODRIGUEZ; CINDY GUILLEN-GOMEZ; STEVE KARAGIOSIAN; ELFEGO RODRIGUEZ; AND JAMAL CHILDS,

Plaintiffs,

-vs-

BURBANK POLICE DEPARTMENT; CITY OF BURBANK; TIM STEHR; KERRY SCHILF; JAMIE "J.J." PUGLISI; DAN YADON; KELLY FRANK; PAT LYNCH; MIKE PARRINELLO; AARON KENDRICK; DARIN RYBURN; AND DOES 1 THROUGH 100, INCLUSIVE.

Defendants.

CASE NO: BC 414602
[Assigned to Hon. Joanne O'Donnell, Dept. 37]

DEFENDANT CITY OF BURBANK'S REPLY POINTS AND AUTHORITIES RESPONDING TO PLAINTIFF JAMAL CHILDS'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT; REPLY DECLARATION OF LINDA SAVITT

Date: March 18, 2010 [Date reserved]
Time: 9:00
Dept.: 37
Trial: Aug. 25, 2010
Action filed: May 28, 2009

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500 N. Brand Blvd., Twentieth Floor
Glendale, CA 91203

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500 N. Brand Blvd., Twentieth Floor
Glendale, CA 91203

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500 N. Brand Blvd., Twentieth Floor
Glendale, CA 91203

SUMMARY OF REPLY

Plaintiff Jamal Childs's improperly oversized 26 page Opposition creates no triable issue of material fact or any argument to defeat summary judgment, even if his numerous rule violations are permitted.[1/] His opposition strategy is to go on a "free for all" attack, throwing up as much inflammatory and irrelevant evidence as possible with the goal of savaging the reputation of Burbank, its Police Department, and its officers.

His opposition features coworker gossip and rumors about stale events outside the statute of limitations, that were not witnessed by Childs, that were not reported to management, and to which Childs did not testify. It has no relevance to Childs's FEHA claims or this motion. Noticeably missing is any ***foundation*** for the proffered evidence: (a) no ***dates*** are provided for the vast majority of events, thereby failing to show any of it occurred within the limitations period, (b) no information is provided showing Childs ***witnessed or knew of*** offensive conduct occurring during the past year and ***reported it to management***, which is required before it is actionable, and (c) "statistical evidence" is offered with no showing of relevance, and no applicant pool data.

Childs's opposition is also fatally deficient on the merits.

1. Plaintiff ***concedes most of the undisputed facts,*** and his opposition separate statement ***cites no supporting evidence on the few facts he claims are "disputed"***; as such, ***all facts in the separate statement are undisputed***. (CRC, rule 3.1350(f) and (h); *Collins v. Hertz Corp.* (2006) 144 Cal.App.4th 64, 75 [summary judgment affirmed where plaintiff's opposition papers failed to comply with separate statement requirements].)

2. Plaintiff effectively ***concedes*** the ***retaliation*** claim, offering no opposition argument.

3. Plaintiff's ***discrimination*** (first) cause of action is fatally deficient. The new "disparate impact" theory that not enough African American officers were ***hired or promoted*** will not salvage

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[1/] In addition to violating the rules on page limits, plaintiff's rule violations include (1) failing to specifically cite pertinent evidence in the opposition separate statement when claiming facts are "disputed" (violating rule 3.1350(f) and (h)), (2) presenting "objections" to Defendant's separate statement of undisputed facts (violating rules 3.1354 and 3.1350), (3) failing to mark deposition testimony (violating rule 3.1116(c)), and (4) providing no table of contents for the evidence (violating rule 3.1350(g)). These violations alone allow the court to grant the motion. (Civ. Proc. Code § 437c(b)(3).)

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Glendale, CA 91203

his missing prima facie case because Childs ***does not allege discrimination in hiring*** and ***he never applied for a promotion***. The "disparate impact" statistics Childs offers provide no relevant data. If this theory had any relevance (it does not), his statistical evidence would still be insufficient because it fails to provide required foundational applicant pool information.[2/]

4. Plaintiff's ***harassment*** (second) cause of action is fatally deficient because Childs identifies no offensive racial conduct ***within the limitations period,*** let alone any current conduct that ***he*** witnessed or heard about and that is so severe or pervasive as to change the terms of his employment. He must offer proof of offensive events occurring ***after March 27, 2008*** (having filed his DFEH complaint on May 27, 2009), but ***he admitted in deposition that he witnessed no offensive events after March 22, 2008***. [UF 45, 93-96; (FAC ¶ 72, Exh. "I").] His "continuing violation" theory based on old gossip is insufficient because it is missing a required element – offensive conduct ***within*** the limitations period. (See fn. 2.) Plaintiff's improper theory, if

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[2/] Most of Childs's evidence is inadmissible because:

(1) It ***lacks foundation*** – noticeably missing (a) the ***date*** on which any conduct occurred which is required to show it is not time barred, (b) any evidence that ***Childs*** witnessed or heard of the conduct, and (c) any showing that it was ***reported*** to management..

(2) It proffers ***irrelevant*** assertions of offensive conduct and gossip that Childs neither witnessed nor was told about. Rumor and innuendo is not a substitute for proof of harassment. (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 518-522.)

(3) It proffers ***irrelevant*** assertions of offensive conduct, rumors, and gossip that occurred outside the statute of limitations, and no evidence of conduct within the statute of limitations.

(4) It proffers ***irrelevant*** "statistical evidence" of hiring and promotions in other cities, having no relevance to Childs's claims, and offering no foundational information about the pool from which hiring and promotional decisions were made.

(5) It proffers declaration testimony from Childs that contradicts his deposition; Childs admitted in deposition that he was assigned to the Juvenile Detective Bureau as an SRO on August 21, 2008, and that he believed it would ***improve his ability to be promoted*** (Childs depo. p. 14:12-20), but his declaration contradicts his prior testimony and asserts that "I have no real hope of advancement" and "I am not certain that I will ever be seriously considered for promotion." (Childs decl. ¶¶ 18, 20.) *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 20-22 bars Childs's contradictory declaration claims, holding that an affidavit contradicting a sworn admission or concession made during discovery creates no triable issue of fact to defeat a summary judgment motion. (*Archdale v. American Internat. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 473 ["Where a party's self-serving declarations contradict credible discovery admissions and purport to impeach that party's own prior sworn testimony, they should be disregarded"].

(6) It ***blatantly misstates "facts"*** – asserting deposition testimony provides "facts" that are ***not*** included in the testimony. (See Defendant's Evidentiary Objections to Plaintiff's Evidence.)

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Glendale, CA 91203

accepted, would impose harassment liability on employers – forever – as long as coworkers continued gossiping about old offensive conduct. No law supports plaintiff's novel theory.

5. Childs's ***failure to prevent harassment*** (fourth) claim is fatally deficient because Childs offers no evidence of a hostile work environment ***he*** experienced and no evidence disputing the anti-harassment policies and training that he and other employees received. [UF 59-84.] Childs's counsel argues a "diversity" trainer (not an anti-harassment trainer) was not re-hired and her "advice" – to keep on hiring and paying her – was not followed, all of which is irrelevant and fails to overcome the above undisputed facts. He argues "training should explain the types of conduct that violate the employer's anti-harassment policy" (Opp. p. 20:6-7), but contradicts himself, asserting that Chief Stehr instructing managers of conduct that violates the anti-harassment policies constitutes offensive conduct and harassment. Childs's deficient theory is that employers must lose either way - if they don't say what is prohibited, they have failed to prevent, and if they do say what is prohibited, it is offensive and creates a hostile work environment.

6. Childs's ***POBRA*** (fifth) claim is fatally deficient because his new POBRA theory presents a factual theory ***never alleged in the complaint***, and he did not amend the complaint to add this new theory. He also filed his complaint ***before*** he filed a government tort claim asserting a POBRA violation, which further bars his claim. The POBRA claim is also deficient on the merits. Childs asserts he was denied inspection and a copy of his personnel file but (a) POBRA does ***not*** require employers to given employees copies of their personnel files (Gov. Code, § 3306.5), and (b) there is no evidence that Childs made any request to inspect or obtain a copy of his personnel file, let alone that any such request was denied.

I. Childs's Discrimination Claim Is Meritless. His New Disparate Impact Theory Based on Hiring and Promotion Statistics Is Irrelevant Because He Makes No Claim of Discrimination in Hiring and Never Applied for a Promotion.

Childs tries to prop-up his fatally deficient discrimination claim by claiming Burbank does not ***hire*** enough African American officers and does not ***promote*** them. He must do this because he admits there was no act of discrimination directed to him, defeating his prima facie case. [UF 13 - undisputed.] He made no claim of failure to hire (he was hired), and admits ***he never applied for a promotion***. He applied for only one special assignment – school resource officer ("SRO") – for

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which he scored number 1 and to which he was appointed, and asserted the position would increase his ability to get promoted. [UF 4-7.] (Childs depo. p. 14:12-20.) He admits receiving positive evaluations and the one and only time he was disciplined, he deserved it. [UF 3, 13-15.]

His new speculation that he won't get promoted creates no triable issue of fact. A plaintiff must present more than speculation and conjecture to create a triable issue of fact. Only ***reasonable*** inferences based on ***substantial*** evidence are allowed. (*Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1149.)

Moreover, his self serving new declaration contradicting his prior testimony (in which he testified he believed his assignment to SRO would ***increase*** his ability to get promoted) creates no triable issue of fact and will not defeat summary judgment. (*D'Amico, supra; Archdale, supra.*)

His statistics are also fatally deficient because there is no factual basis or other foundation that would allow the introduction of the proffered statistics. In addition to having no claim of failure to hire or failure to promote, statistical evidence generally applies to a theory of a "pattern or practice" as used in class claims. But Childs alleges no class claims or "pattern or practice" theory. (See *Capitol People First v. Dept. of Developmental Services* (2007) 155 Cal. App. 4th 676, 695-96 ["pattern and practice" as a "method[] of proof commonly allowed in the class action context"]; *Bacon v. Honda* (6th Cir. 2004) 370 F.3d 565, 575 [finding "pattern or practice" method of proving discrimination not available to individual plaintiffs].) Childs's proffered statistical evidence of hiring and promotions is irrelevant to Burbank, to Childs, and to this motion. It also requires a further foundation in which the pool of applicants and workers in each city must be detailed to justify the statistics and their relevance.[3/] This too is missing from Childs's evidence.

II. Childs's Harassment Claim Is Meritless. Stale Gossip About Offensive Conduct Outside The Limitations Period and Conduct Childs Did Not Witness Provides No Support For His Claim.

Childs claims he has evidence of purported "smoking guns" consisting of coworker gossip

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[3/] "Statistics such as these, however, without an analytic foundation, are virtually meaningless." (*Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733.) "To say that very few blacks have been selected by Honda does not say a great deal about Honda's practices unless we know how many blacks have applied and failed and compare that to the success rate of equally qualified white applicants." (*Brown v. American Honda Motor Co.* (11th Cir. 1991) 939 F.2d 946, 952, emphasis added.)

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Glendale, CA 91203

and rumors about offensive conduct, much of which occurred years ago. (See Savitt Reply Declaration, ¶¶ 2-3.) His evidence lacks foundation, is not material, is irrelevant and time barred, and creates no substantial evidence of a triable issue of fact.

To show a hostile work environment, Childs must show offensive conduct ***he witnessed*** that ***occurred within the limitations period***, but he has identified ***no such conduct.*** Offensive conduct by a co-worker must also be reported to or known by the employer, and there must be a further showing that the employer failed to take adequate steps to address it. (Gov. Code § 12940(j)(1); *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 803.)

Coworker gossip is not substantial evidence sufficient fill in the elements required to show harassment. (See *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 518-522 ["[W]e caution that mere workplace gossip is not a substitute for proof. Evidence of harassment of others, and of a plaintiff's awareness of that harassment, is subject to the limitations of the hearsay rule. It is not a substitute for direct testimony by the victims of those acts, or by witnesses to those acts."])

The opposition evidence fails to allow any inference of harassment because ***Childs does not claim to have personally experienced any offensive conduct within the limitations period, or to have even heard of any.*** (*Beyda, supra,* at pp. 518-522 ["If, however, the plaintiff neither witnesses the other incidents nor knows that they occurred, those incidents cannot affect his or her perception of the hostility of the work environment. The objective severity of harassment must be judged from the perspective of a reasonable person in the plaintiff's position. [Citation.] A reasonable person would not perceive a work environment to be objectively hostile or abusive based on conduct toward others of which she is unaware."]; *Lebovitz v. New York City Transit Authority* (2nd Cir. 2001) 252 F.3d 179, 182 [finding Lebovitz's claim "rests on emotional trauma, allegedly suffered due to her belief that other women in other parts of her workplace were harassed and that the defendant was not vigorously investigating those complaints. We hold that Title VII's prohibition against hostile work environment discrimination affords no claim to a person who experiences it by hearsay."])

Childs argues that any offensive conduct in the workplace, regardless of time, can establish a hostile work environment, even if Childs did not personally witness it. He is wrong. Third party

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testimony is allowed only to corroborate accounts of events that Childs personally experienced or knew about - not to excuse his lack of such evidence. [4]

Childs also miscites *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, improperly claiming the lower court's opinion as recited on page 145 was its holding. What *Aguilar* did state at page 146 was: "It certainly is possible that the use of racial epithets even outside the hearing of plaintiffs would ***contribute*** to an atmosphere of racial hostility that would ***perpetuate*** the hostile work environment created by defendants." (Emphasis added.) However, before a plaintiff can rely on conduct he did not personally experience, and to meet *Aguilar*'s requirement that such conduct "perpetuate" a hostile work environment, the plaintiff must have ***personally experienced offensive conduct within the limitations period***. The plaintiff must also have ***actually known of any other offensive conduct occurring within the limitations period***. As such, rumors of old events Childs did not witness and did not even know about, together with no evidence of any current offensive conduct, creates no triable issue of fact.

Lacking evidence to create a prima facie case, Childs cannot rely on the "continuing violation" rule to resurrect his harassment claim. The continuing violation doctrine requires

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[4] Childs's voluminous evidence makes no mention of ***who*** allegedly engaged in the offensive conduct, ***when*** it occurred or in ***what context***. Childs proffered testimony that offers only bare assertions that certain conduct happened - sometime, somewhere, somehow. Many witnesses were not sure of what happened, and provided vague responses to inflammatory leading questions from plaintiff's counsel that provided no context. These vague assertions provide no basis for inferring discrimination or harassment. (See e.g., *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal. 4th 264, 291 [upholding summary judgment for the employer: "plaintiff asserted [co-workers] used epithets 'regularly' .... Her vagueness about this point and the circumstances surrounding the incidents did not aid in showing that use of epithets contributed to an objectively abusive or hostile work environment."]; *Carter v. Ball* (4th Cir. 1994) 33 F.3d 450, 461-62 [Plaintiff's harassment claim "is not substantiated by accounts of specific dates, times or circumstances. Such general allegations do not suffice to establish an actionable claim of harassment."]) Moreover, witness Dannel Arnold left the Burbank Police Department in ***2006***; his testimony is irrelevant.

Childs's approach has also been derided by courts as an impermissible "parade of witnesses" approach. (See e.g., *Moorhouse vs. Boeing Co.* (E.D. Pa.) 501 F. Supp. 390, 394, fn.4 , aff'd, 639 F.2d 774 (3d. Cir. 1980), ["even the strongest jury instructions could not have dulled the impact of a parade of witnesses, each re-counting his contention that defendant [discriminated against him]."])

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current offensive conduct.[5] Lingering effects of offensive conduct will not resurrect time barred claims. (*Ledbetter v. Goodyear Tire and Rubber Co.* (2007) 550 U.S. 618; 127 S.Ct. 2162; 167 L. Ed. 2d 982.) Childs has no evidence of current offensive conduct, and instead has admitted that all offensive conduced ceased, so far as he was aware, more than a year before he filed his DFEH charge, thereby proving that any problem had been corrected. [UF 44-45.] This is the ***opposite*** of a continuing violation. Nor does his testimony of being told by plaintiff Rodriguez of Chief Stehr's instruction to managers that an epithet was not to be used change this result, as explained further below. (*Lebovitz, supra.* [hearsay is insufficient to support a harassment claim].) "[W]hen the harassing conduct is not ***severe in the extreme***, more than a few isolated incidents must have occurred to prove a claim based on working conditions." (*Lyle, supra,* 38 Cal.4th at p. 284, emphasis added.];

Childs repeatedly cites *Miller v. Department of Corrections* (2005) 36 Cal.4th 446 for the proposition that there is a triable issue of fact as to harassment. *Miller* held only that sexual harassment under FEHA could be established by demonstrating widespread sexual favoritism that is severe or pervasive enough to alter the terms of employment and that blocked merit-based advancement. Childs has identified no evidence of offensive conduct within the limitations period, let alone conduct meeting the *Miller* test.[6] And he identifies no law recognizing any ongoing

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[5] An employer may face liability under the continuing violation doctrine for unlawful conduct outside FEHA's one year administrative filing deadline if the conduct is ***sufficiently connected to conduct within the one year period,*** where conduct (1) is "sufficiently similar in kind" to the timely alleged conduct; (2) "occurred with reasonable frequency" (as distinguished from an isolated work assignment or an employment decision); and (3) "ha[s] not acquired a degree of permanence" so that employees are on notice that further efforts to resolve the allegedly unlawful conduct "will be futile." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 812, 823.) Thus, an employee must present more than objectionable old conduct to establish a continuing violation. (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1042.)

[6] For claims of discrimination based on adverse employment actions the same rule applies – evidence that other employees suffered similar discrimination (commonly referred to as "me too" evidence) must be specifically for the purpose of proving that the particular decision-maker who made the decision about the plaintiff held a discriminatory animus toward the particular protected classification of which the plaintiff was a member. (See *Wyvill v. United Companies Life Insurance Co.* (5th Cir. 2000) 212 F.3d 296, 303 ["By admitting this evidence, the district court substantially (continued...)

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Glendale, CA 91203

FEHA liability based on coworker gossip about old conduct.

III. Childs's "Failure To Prevent" Claim Is Meritless.

Childs's failure to prevent claim fails because he has no evidence of any actionable harassment, discrimination, or retaliation. (*Trujillo v. North County Transit District* (1998) 63 Cal.App.4th 280, 289.) Childs cites no authority recognizing this claim where the plaintiff is unable to show a hostile work environment to begin with. Even ignoring this fatal defect, Burbank further presented undisputed facts of its reasonable actions to prevent discrimination, harassment or retaliation. It has anti-harassment policies and trainings, has repeatedly reminded its employees of policies, and has investigated claims of unlawful conduct. [UF 44, 58-84.]

Childs now argues that by not re-hiring a "diversity" trainer, this is evidence of failure to prevent harassment. He misrepresents the trainer's testimony, and contends her opinion that more "diversity" training was needed somehow supports his claim. His arguments makes no sense. First, no law requires an employer to hire or use a "diversity" trainer. Second, a trainer's self interest in getting rehired to do additional work at taxpayer expense creates no substantial evidence of harassment or failure to prevent harassment. Third, anti-harassment policies and training were provided by Burbank. Childs admits these undisputed facts, and that there were no incidents of a hostile work environment during the limitations period. [UF 44, 58-84.] No reasonable inference can be made to support a failure to prevent claim.

Childs also argues that anti-harassment training "should explain the types of conduct that violate the employer's anti-harassment policy" (Opp. p. 20:6-7), but he then accuses Chief Stehr of engaging in offensive and harassing conduct by telling managers of epithets that are ***not*** permitted. Childs cannot prevail with these contradictory positions (you must tell us what we can't do, but when you do, we'll claim that constitutes harassment too).

IV. Childs's New POBRA Claim Is Meritless And Barred As Unalleged And Insufficient.

Childs's complaint includes only boilerplate allegations of a POBRA violation, with no

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[6](...continued)
prejudiced [the employer], forcing it to respond to each witness's claims, and creating, in effect, several 'trials within a trial.'"]) Childs offers no such evidence.

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Glendale, CA 91203

factual detail to support them, and shows no POBRA claim was included in his government claim. Each of these defects, individually, is fatal to his POBRA claim.[7/]

The insufficient pleadings as to Childs specifically entitle Burbank to judgment in its favor; the legal effect of this motion is the same as a demurrer or motion for judgment on the pleadings; judgment is required here because the pleadings are insufficient. (*Robinson v. Hewlett-Packard Corp.* (1986) 183 Cal.App.3d 1108, 1131, disapproved on other grounds in *Rojo v. Kliger* (1990) 52 Cal.3d 65; *American Airlines, Inc. v. San Mateo County* (1996) 12 Cal.4th 1110, 1118.)

Even ignoring Childs's pleading deficiencies, he also admits he had only one written reprimand on March 31, 2006 which he accepted without challenge ***because it was correct in view of his conduct.*** [UF 15.] This establishes no potential POBRA violation on the merits.

In his opposition, ***for the first time*** Childs identifies a new factual theory under POBRA, asserting that during this litigation, he was denied inspection and a ***copy*** of his ***personnel file***. His declaration fails to state he ever made such a request. His belated new theory has multiple failings.

First, ***this theory is not alleged in the complaint, and he did not amend the complaint before the hearing to add this new factual theory.*** As such, he cannot rely on this theory to defeat a summary judgment motion. (*580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 18; [a party cannot defeat summary judgment on a different factual theory than what is alleged in the complaint unless it moved to amend prior to the summary adjudication hearing].)

Second, his new POBRA claim is barred by the Government Claims Act. Childs made no government claim asserting a POBRA violation ***before*** filing suit. (*State of California v. Superior Court of Kings County (Bodde)* (2004) 32 Cal.4th 1234, 1239.) He cannot correct this defect in the middle of his suit.

Third, he claims Government Code section 3306.5 – allowing employees to "inspect" their

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[7/] Childs incorrectly criticizes defendant for relying on complaint allegations. *St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1234, 1248 states "In summary judgment or summary adjudication proceedings, ``[a]dmissions of material facts made in an opposing party's pleadings are binding on that party as "judicial admissions." They are conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted, by the party whose pleadings are used against him or her.' .... '"[A] pleader cannot blow hot and cold as to the facts positively stated."'" (Citations omitted.)

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500 N. Brand Blvd., Twentieth Floor
Glendale, CA 91203

personnel files – was violated but (a) plaintiff states no cause of action because it only allows an officer to ***inspect*** a file, ***not "copy" it,*** as alleged in his belated government claim, (b) Childs does not ***allege*** he requested an ***inspection*** of his personnel file, and (c) Childs offered no ***evidence*** that he ever asked to inspect or copy his personnel file (he made no such request).

Fourth, even if his original government claim had asserted a POBRA violation (it did not), it would still be untimely. A government claim must be made within ***six months*** of the wrongful conduct. His later government claim, presented on March 4, 2010, still limits him to asserting claims based on events occurring ***between October 4, 2010 and March 4, 2010***. He identified no evidence of any wrongful conduct during that timeframe.

Childs relies on Chief Stehr's declaration filed in this case during injunction proceedings when other plaintiffs (not Childs) were compelled to return personnel files of nonparty police officers that plaintiffs had stolen and later produced in discovery. The other plaintiffs refused to return these stolen documents to Burbank, requiring the city to go to Judge Chalfant in writs and receivers who ***issued a protective order compelling the other plaintiffs and their counsel to return all non-party police personnel files***. (See Request for Judicial Notice.) Plaintiffs were allowed to keep a few documents from their own personnel files that included private information about other individuals. Waivers were requested from the other plaintiffs to protect the city from claims of breach of confidentiality in the event that plaintiffs (in possession of documents) allowed them to be disclosed to others.

None of this pertains to Childs, nor does it support any POBRA claim.

CONCLUSION

For the reasons stated in the moving and reply papers, summary judgment should be granted against plaintiff Jamal Childs, in favor of Burbank.

DATED: March 12 2010

BALLARD ROSENBERG GOLPER & SAVITT, LLP

By: CHRISTINE T. HOEFFNER
Attorneys for Defendant
CITY OF BURBANK, including the Police Department of the City of Burbank

BALLARD ROSENBERG GOLPER & SAVITT LLP
500 N. Brand Blvd., Twentieth Floor
Glendale, CA 91203

Declaration of
Linda Miller Savitt

REPLY DECLARATION OF LINDA SAVITT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT/ADJUDICATION OF ISSUES

I, Linda Miller Savitt, declare:

1 I am an attorney at law licensed to practice in the state of California and a partner in the firm of Ballard Rosenberg Golper & Savitt LLP, attorneys of record for defendant CITY OF BURBANK, including the Police Department of the City of Burbank, in this case. I am the partner in charge of this case. The facts set forth herein are personally known to me and I have first hand knowledge thereof. If called as a witness I could and would testify competently thereto.

2. Plaintiff Childs's opposition to the summary judgment motion of the City of Burbank includes testimony of Dannel Arnold, but fails to disclose that he stopped working for the the City of Burbank in 2006, making his testimony irrelevant and lacking foundation as to any issues in this motion against Childs. Attached hereto as Exhibit "E" are true and correct copies of pages from Arnold's deposition, which I elicited in February of 2010, that provide his testimony that his last day of work at Burbank was February 13, 2006. Plaintiff omits this information from his opposition evidence and instead improperly argues – without foundation – that Arnold's testimony creates a triable issue of fact that Childs experienced a hostile work environment in 2008 or 2009.

3. The additional evidence presented with this reply is not to supplement the facts (see Evid. Code, § 356) but to support evidentiary objections to plaintiff's proffer of Arnold's testimony and to show plaintiff's evidence lacks foundation.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and was executed on March 11, 2010, at Glendale, California.

Linda Miller Savitt

Linda Miller Savitt

BALLARD ROSENBERG GOLPER & SAVITT LLP
500 N. Brand Blvd., Twentieth Floor
Glendale, CA 91203

EXHIBIT E

00001

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

OMAR RODRIGUEZ; CINDY GUILLEN-GOMEZ, STEVE KARAGIOSIAN;) ELFEGO RODRIGUEZ, and JAMAL CHILDS,

Plaintiffs,

vs.) No: BC 414 602

BURBANK POLICE DEPARTMENT; CITY OF BURBANK, and DOES 1 THROUGH 25, inclusive,

Defendants.

VIDEOTAPED DEPOSITION OF DANNEL ARNOLD

Monday, February 15, 2010

Encino, California

REPORTED BY:

Charlene VanSloten, CSR No. 5372

Certified Shorthand Reporter

00101

Have you spoken with anybody from this office other than for the purpose of scheduling this deposition?

A. No.

Q. Has anyone, and I mean anyone suggested to you what you should say at this deposition?

A. No.

Q. Have you been offered any compensation or benefits of any kind in exchange for your testimony today?

A. No. The only thing was there was a check written to my department for witness fees. That's all that I know of. That's not for me.

Q. Do you have any hopes of financial gain as a result of the outcome of this lawsuit that we're here today on?

A. Not at all.

MR. GRESEN: I don't have any further questions.

MS. SAVITT: Okay. I have a few questions.

EXAMINATION

BY MS. SAVITT:

Q. Mr. Arnold, is it true your last day of work

00102
1 at the Burbank Police Department was February 13th,
2 2006?
3 A. Sounds correct.
4 Q. Okay. And you began as a probationary
5 officer in September of 2005?
6 A. Well, I began in 2001 as a reserve officer.
7 If you're talking about my original experience or when
8 I got hired full-time?
9 Q. I'm asking about when you were a probationary
10 paid police officer.
11 A. Oh, okay. Yes.
12 Q. From 2001 until 2005, as a reserve officer
13 you were not paid, correct?
14 A. Correct.
15 Q. And how many days a week did you work?
16 A. It depended. I'd try to get in at least once
17 a week, but sometimes I would go a couple weeks without
18 working depending upon what was happening personally.
19 Q. And how did you schedule your time as a
20 reserve officer?
21 A. Basically just showed up.
22 Q. So they didn't have advance notice that you
23 were coming up that day?
24 A. Not usually.
25 Q. Did you attend roll call when you were there

CERTIFICATION

OF

CERTIFIED SHORTHAND REPORTER

I, the undersigned, a Certified Shorthand Reporter of the State of California do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were placed under oath; that a verbatim record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; further, that the foregoing is an accurate transcription thereof.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney of any of the parties.

IN WITNESS WHEREOF, I have this date subscribed my name _____.

Dated: FEB 19 2010

Certificate Number 5372